

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

OPEN SOCIETY JUSTICE INITIATIVE,

Plaintiff,

v.

Civil Action No. _____

DEPARTMENT OF DEFENSE,
DEFENSE INTELLIGENCE AGENCY,
UNITED STATES INDO-PACIFIC
COMMAND,
DEPARTMENT OF STATE,
DEPARTMENT OF TREASURY,
OFFICE OF THE DIRECTOR OF
NATIONAL INTELLIGENCE, and
CENTRAL INTELLIGENCE AGENCY

Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF

INTRODUCTION

1. This case is about the public’s right, under the Freedom of Information Act (“FOIA”), to access records critical for assessing the government’s response to the COVID-19 pandemic. Today, the United States has the largest number of reported COVID-19 cases in the world. In contrast to several countries in Europe and Asia where infections are declining, in the U.S., the pandemic is resurging. At least 126,000 have died of the disease, over 2.5 million are infected, and these numbers are projected to continue to rise in the coming months.¹ Defendants

¹ Centers for Disease Control and Prevention, *Coronavirus Disease 2019: Cases in the US* (June 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

have failed to comply with their obligations under FOIA and obstructed the public's access to vital information about the government's competence to combat the virus and protect lives.

2. Accordingly, this is an action under the FOIA, 5 U.S.C. § 552, seeking injunctive relief to compel Defendants Department of Defense ("DOD"), including its components Defendants Defense Intelligence Agency ("DIA") and United States Indo-Pacific Command ("Indo-Pac"), Department of State ("State"), Department of Treasury ("Treasury"), Office of the Director of National Intelligence ("ODNI"), and Central Intelligence Agency ("CIA") to immediately release records responsive to Plaintiff's FOIA requests regarding the timing and substance of the Executive Branch's response to the COVID-19 pandemic.

3. Plaintiff brings this action because the statutory time limit for action has passed, but several Defendants have neither issued final determinations on Plaintiff's requests nor disclosed any responsive records.

4. While Defendant CIA issued Plaintiff a final determination, Plaintiff appealed and more than twenty business days have passed since Plaintiff submitted an administrative appeal.

JURISDICTION AND VENUE

5. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) because Plaintiff's principal place of business is in this district.

PARTIES

6. The Open Society Justice Initiative ("OSJI") is a public interest law center dedicated to upholding human rights and the rule of law through litigation, advocacy, research, and technical assistance. It is part of the Open Society Institute, a tax-exempt, non-partisan, not-

for-profit organization headquartered in New York City. OSJI is a “person” within the meaning of 5 U.S.C. § 551(2). Disseminating information is among OSJI’s core activities. OSJI maintains a website, <http://www.justiceinitiative.org>, through which it disseminates publications, articles, and multimedia files relating to its mission. It also directly distributes hard copies of publications and disseminates information through quarterly email newsletters, blogs, Twitter, Facebook, and other media.

7. Defendant DOD is an “agency” within the meaning of 5 U.S.C. § 552(f)(1) and is therefore subject to FOIA. Defendants DIA and Indo-Pac are components of the DOD. DOD and its components DIA and Indo-Pac have possession and control over some or all of the requested records.

8. Defendant State is an “agency” within the meaning of 5 U.S.C. § 552(f)(1) and is therefore subject to FOIA. State has possession and control over some or all of the requested records.

9. Defendant Treasury is an “agency” within the meaning of 5 U.S.C. § 552(f)(1) and is therefore subject to FOIA. Treasury has possession and control over some or all of the requested records.

10. Defendant ODNI is an “agency” within the meaning of 5 U.S.C. § 552(f)(1) and is therefore subject to FOIA. ODNI has possession and control over some or all of the requested records.

11. Defendant CIA is an “agency” within the meaning of 5 U.S.C. § 552(f)(1) and is therefore subject to FOIA. CIA has possession and control over some or all of the requested records.

STATEMENT OF FACTS

12. The earliest known case of COVID-19 (the disease caused by what is now known as SARS-CoV-2) reportedly can be traced back to November 17, 2019, in Hubei province, China.² By December 31, 2019, health officials in Wuhan posted a notice that they were investigating an outbreak of pneumonia in the city, and the World Health Organization (“WHO”) acknowledged that on that date it “was informed of a cluster of cases of pneumonia of unknown cause.”³ As of January 3, 2020, Chinese authorities reported to the WHO a total of 44 patients with pneumonia of unknown etiology.⁴

13. Media reports provide varying accounts of when the Executive Branch first received notice of what is now known as SARS-CoV-2. *ABC News* reported, for example, that a November intelligence report by the military’s National Center for Medical Intelligence (“NCMI”) detailed concerns about what is now known as SARS-CoV-2, and the report “was briefed multiple times” to the DIA, the Pentagon’s Joint Staff, and the White House.⁵

14. According to the *New York Times*, in early January 2020 State’s epidemiologist wrote in a report to the Director of National Intelligence that the virus was likely to spread across

² Helen Davidson, *First Covid-19 case happened in November, China government records show*, The Guardian (Mar. 13, 2020), <https://www.theguardian.com/world/2020/mar/13/first-covid-19-case-happened-in-november-china-government-records-show-report>.

³ Wuhan Municipal Health Commission on the current situation of pneumonia in our city (*translated from Mandarin*), Dec. 31, 2019, *available at* <http://www.wuhan.gov.cn/front/web/showDetail/2019123108989>; World Health Organization, Coronavirus disease (COVID-2019) R&D, *available at* <https://www.who.int/blueprint/priority-diseases/key-action/novel-coronavirus/en/>.

⁴ World Health Organization, *Pneumonia of unknown cause – China* (Jan. 5, 2020), <https://www.who.int/csr/don/05-january-2020-pneumonia-of-unknown-cause-china/en/>.

⁵ Josh Margolin & James Gordon Meek, *Intelligence report warned of coronavirus crisis as early as November: Sources*, ABC News (Apr. 8, 2020), <https://abcnews.go.com/Politics/intelligence-report-warned-coronavirus-crisis-early-november-sources/story?id=70031273>.

the globe and become a pandemic, and the NCMI independently arrived at the same conclusion.⁶ The *Washington Post* also reported that in January 2020, U.S. intelligence agencies regularly provided information about the global danger of what is now known as SARS-CoV-2 to Executive Branch officials and members of Congress, including in daily briefing papers and digests from the ODNI and the CIA.⁷

15. According to the *Washington Post*, on January 3, 2020, a Chinese official informed Robert Redfield, Director for the Centers for Disease Control and Prevention (“CDC”), of the outbreak of a respiratory illness in the city of Wuhan.⁸ Redfield relayed the report to Alex Azar, Secretary for Health and Human Services (“HHS”), who reportedly relayed it to the White House.⁹

16. Although the Executive Branch has publicly promised transparency, the White House reportedly ordered federal health officials to treat top-level coronavirus meetings as classified to keep meeting participation low and minimize leaks.¹⁰ Classification prevented relevant officials from attending the meetings because they did not possess the requisite security

⁶ Eric Lipton, et al., *He Could Have Seen What Was Coming: Behind Trump’s Failure on the Virus*, N.Y. Times (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html>.

⁷ Shane Harris et al., *U.S. intelligence reports from January and February warned about a likely pandemic*, Wash. Post (Mar. 20, 2020), https://www.washingtonpost.com/national-security/us-intelligence-reports-from-january-and-february-warned-about-a-likely-pandemic/2020/03/20/299d8cda-6ad5-11ea-b5f1-a5a804158597_story.html.

⁸ Yasmine Abutaleb et al., *The U.S. was beset by denial and dysfunction as the coronavirus raged*, Wash. Post (Apr. 4, 2020), <https://www.washingtonpost.com/national-security/2020/04/04/coronavirus-government-dysfunction>.

⁹ *Id.*

¹⁰ Aram Roston & Marisa Taylor, *Exclusive: White House told federal health agency to classify coronavirus deliberations – sources*, Reuters (Mar. 11, 2020), <https://www.reuters.com/article/us-health-coronavirus-secrecy-exclusive/exclusive-white-house-told-federal-health-agency-to-classify-coronavirus-deliberations-sources-idUSKBN20Y2LM>.

clearances.¹¹

17. On January 21, 2020, the CDC publicly confirmed the first U.S. novel coronavirus case, what is now known as SARS-CoV-2, in the state of Washington.¹² In a memorandum dated January 29, 2020, Peter Navarro, President Trump’s trade advisor, warned the White House of “a full-blown pandemic, imperiling the lives of millions of Americans.”¹³ Although President Trump said he did not know about the memorandum at that time, press reports indicate that the President knew about it and was unhappy that Navarro had put his warning in writing.¹⁴ The same day, the White House announced the formation of “a coronavirus task force,” while noting that “[t]he risk of infection for Americans remains low.”¹⁵

18. On January 30, 2020, the WHO declared the outbreak a “Public Health Emergency of International Concern.”¹⁶ Hours after that declaration, President Trump said during a speech on trade at a Michigan manufacturing plant that the virus was “going to have a very good ending for us. So that I can assure you.”¹⁷

¹¹ *Id.*

¹² Press Release, *First Travel-related Case of 2019 Novel Coronavirus Detected in United States*, Centers for Disease Control and Prevention (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

¹³ Maggie Haberman, *Trade Adviser Warned White House in January of Risks of a Pandemic*, N.Y. Times (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/navarro-warning-trump-coronavirus.html>.

¹⁴ Eric Lipton et al., *He Could Have Seen What Was Coming: Behind Trump’s Failure on the Virus*, N.Y. Times (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html>.

¹⁵ *Statement from the Press Secretary Regarding the President’s Coronavirus Task Force*, White House (Jan. 29, 2020), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-presidents-coronavirus-task-force/>.

¹⁶ *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)*, World Health Organization (Jan. 30, 2020), [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

¹⁷ Caitlin Oprysko, *Trump: Coronavirus will have ‘a very good ending for us,’ Politico* (Jan. 30, 2020),

19. The WHO began supplying diagnostic test kits to various countries in January, but the U.S. opted not to use that test, choosing to develop its own.¹⁸ Contrary to an April 2018 agreement between the CDC and three of the biggest associations involved in lab testing, the Executive Branch reportedly prevented non-government laboratories from assisting in testing.¹⁹ The CDC released a flawed test in February 2020 that took weeks to correct.²⁰

20. The Executive Branch has responded disparately to state governors' requests for drugs, medical supplies and equipment, prompting questions about whether politics influenced their allocation across states.²¹

21. From January 2020 onwards, President Trump has repeatedly downplayed the threat posed by the novel coronavirus.²² On January 22, President Trump said he was not worried about a pandemic, stating, "We have it totally under control...It's one person coming in from China, and we have it under control. It's going to be just fine."²³ On January 24, President Trump

<https://www.politico.com/news/2020/01/30/trump-close-cooperation-china-coronavirus-109701>.

¹⁸ Donald McNeil, *Did Federal Officials Really Question W.H.O. Tests for Coronavirus?*, N.Y. Times (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/health/coronavirus-tests-who.html>.

¹⁹ Bob Ortega et al., *How the government delayed coronavirus testing*, CNN (Apr. 9, 2020), <https://www.cnn.com/2020/04/09/politics/coronavirus-testing-cdc-fda-red-tape-invs/index.html>.

²⁰ *Id.*

²¹ Toluse Olorunnipa et al., *Governors plead for medical equipment from federal stockpile plagued by shortages and confusion*, Wash. Post (Mar. 31, 2020), https://www.washingtonpost.com/politics/governors-plead-for-medical-equipment-from-federal-stockpile-plagued-by-shortages-and-confusion/2020/03/31/18aadda0-728d-11ea-87da-77a8136c1a6d_story.html.

²² David Leonhardt, *A Complete List of Trump's Attempts to Play Down Coronavirus*, N.Y. Times (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/opinion/trump-coronavirus.html>.

²³ Matthew J. Belvedere, *Trump says he trusts China's Xi on coronavirus and the US has it 'totally under control'*, CNBC (Jan. 22, 2020), <https://www.cnbc.com/2020/01/22/trump-on-coronavirus-from-china-we-have-it-totally-under-control.html>.

tweeted that the “United States greatly appreciates [China’s] efforts and transparency,” and “[i]t will all work out well.”²⁴ On February 7, 2020, he tweeted that “as the weather starts to warm...the virus hopefully becomes weaker, and then gone.”²⁵ On February 10, he stated at a New Hampshire rally, “looks like, by April, you know, in theory, when it gets a little warmer, it miraculously goes away.”²⁶ On February 24, he tweeted that “[t]he Coronavirus is very much under control in the USA.”²⁷ On March 7, President Trump publicly stated that “anybody that needs a test gets a test. We – [t]hey’re there. They have the tests. And the tests are beautiful.”²⁸

22. On March 19, President Trump publicly suggested during his daily coronavirus briefing that the drugs chloroquine and hydroxychloroquine were a possible “game changer” for treating COVID-19,²⁹ despite insufficient evidence of their efficacy.³⁰ A few days later, a man

²⁴ Donald J. Trump (@realDonaldTrump), Twitter (Jan. 24, 2020, 4:18 PM), <https://twitter.com/realdonaldtrump/status/1220818115354923009>.

²⁵ Donald J. Trump (@realDonaldTrump), Twitter (Feb. 7, 2020, 5:31 AM), <https://twitter.com/realdonaldtrump/status/1225728756456808448>.

²⁶ David Leonhardt, *A Complete List of Trump’s Attempts to Play Down Coronavirus*, N.Y. Times (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/opinion/trump-coronavirus.html>.

²⁷ Donald J. Trump (@realDonaldTrump), Twitter (Feb. 24, 2020, 4:42 PM), <https://twitter.com/realdonaldtrump/status/1232058127740174339>.

²⁸ *Remarks by President Trump After Tour of the Centers for Disease Control and Prevention, Atlanta, GA*, White House (Mar. 6, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-tour-centers-disease-control-prevention-atlanta-ga/>.

²⁹ *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, White House (Mar. 19, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-6/>.

³⁰ Charles Ornstein, *What We Know — and Don’t Know — About Possible Coronavirus Treatments Promoted by Trump*, Politico (Mar. 29, 2020), <https://www.propublica.org/article/what-we-know-and-dont-know-about-possible-coronavirus-treatments-promoted-by-trump>; see also Michael Crowley et al., *Ignoring Expert Opinion, Trump Again Promotes Use of Hydroxychloroquine*, N.Y. Times (Apr. 5, 2020), <https://www.nytimes.com/2020/04/05/us/politics/trump-hydroxychloroquine-coronavirus.html>; Peter Baker et al., *Trump’s Aggressive Advocacy of Malaria Drug for Treating Coronavirus Divides Medical Community*, N.Y. Times (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/coronavirus-trump-malaria-drug.html>.

died and his wife was hospitalized after the couple ingested a form of chloroquine.³¹

23. On April 3, 2020, President Trump reversed previous guidance on masks, announcing that people in the U.S. should wear face coverings in public to slow the spread of SARS-CoV-2.³² On April 14, contrary to his previous praise for China's "efforts and transparency,"³³ President Trump announced that he had instructed the Executive Branch to suspend funding to the WHO because it "willingly took China's assurances to face value" and "pushed China's misinformation."³⁴

24. On April 16, 2020, after the White House released nonbinding guidelines recommending how and when states and localities should begin to reopen parts of the economy, President Trump stated that governors could reopen businesses by May 1 or earlier if they believed it prudent.³⁵ On April 22, 2020, Dr. Rick Bright, former director of HHS Biomedical Advanced Research and Development Authority and former Deputy Assistant Secretary for Preparedness and Response, said that he was dismissed from his positions and transferred to the National Institutes of Health after he pressed for rigorous vetting of hydroxychloroquine, the drug embraced by

³¹ Scott Neuman, *Man Dies, Woman Hospitalized After Taking Form Of Chloroquine To Prevent COVID-19*, NPR (Mar. 24, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/24/820512107/man-dies-woman-hospitalized-after-taking-form-of-chloroquine-to-prevent-covid-19>.

³² Lena Sun & Josh Dawsey, *New face mask guidance comes after battle between White House and CDC*, Wash. Post (Apr. 3, 2020), <https://www.washingtonpost.com/health/2020/04/03/white-house-cdc-turf-battle-over-guidance-broad-use-face-masks-fight-coronavirus/>.

³³ Donald J. Trump (@realDonaldTrump), Twitter (Jan. 24, 2020, 4:18 PM), <https://twitter.com/realdonaldtrump/status/1220818115354923009>.

³⁴ *Remarks by President Trump in Press Briefing*, White House (Apr. 14, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-press-briefing/>.

³⁵ Peter Baker & Michael D. Shear, *Trump Says States Can Start Reopening While Acknowledging the Decision Is Theirs*, N.Y. Times (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/us/politics/coronavirus-trump-guidelines.html>.

President Trump for treating the virus.³⁶

25. On April 23, 2020, President Trump suggested at a White House briefing that an “injection inside” the human body with a disinfectant could help combat COVID-19.³⁷ The same day, the Environmental Protection Agency issued a press release warning against ingesting disinfectants or applying them on the human body.³⁸ The day after the President suggested that a disinfectant injection could counter the virus, New York City’s poison control center reported receiving a higher-than-normal number of calls, many of them relating to exposure to disinfectants.³⁹

26. President Trump has claimed that “testing is overrated” and “makes us look bad” and suggested that some Americans “wore facial coverings not as a preventative measure but as a way to signal disapproval of him.”⁴⁰ On June 20, 2020, he hosted a rally in Tulsa, Oklahoma despite concerns about rising numbers of coronavirus cases in the area and concerns about the

³⁶ *Vaccine Chief Says He Was Removed After Questioning Drug Trump Promoted*, N.Y. Times (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/us/coronavirus-live-coverage.html#link-652aa9c3>.

³⁷ *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, White House (Apr. 23, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-31/>.

³⁸ *EPA provides critical information to the American public about safe disinfectant use* (Apr. 23, 2020), <https://www.epa.gov/newsreleases/epa-provides-critical-information-american-public-about-safe-disinfectant-use>.

³⁹ Jason Slotkin, *NYC Poison Control Sees Uptick In Calls After Trump’s Disinfectant Comments*, NPR (Apr. 25, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/25/845015236/nyc-poison-control-sees-uptick-in-calls-after-trumps-disinfectant-comments>.

⁴⁰ Dylan Scott, *Trump baselessly claims Covid-19 testing is “overrated” and people wear masks to spite him*, Vox (June 18, 2020), <https://www.vox.com/2020/6/18/21295826/coronavirus-us-update-trump-wsj-interview-masks-tests>.

event becoming a “super-spreader.”⁴¹ Significantly, six of the Trump campaign’s advance team had tested positive for coronavirus before the rally and two other workers tested positive after the rally.⁴² At the rally, President Trump referred to widespread testing as a “double-edged sword.”⁴³ He added: “When you do testing to that extent, you’re going to find more people you’re going to find more cases. So I said to my people slow the testing down, please.”⁴⁴

27. As of June 30, 2020, there are over 2.5 million confirmed cases of Covid-19 in the U.S. and over 126,000 have died of the disease.⁴⁵ The CDC projects that by July 18, 2020, there will be between 130,000-150,000 reported COVID-19 deaths in the U.S.⁴⁶

28. As the U.S. braces for a “second wave” of the virus, public debate around the administration’s response (or lack thereof) to the disease continues unabated.⁴⁷ The immediate release of the requested records is critical for the public to evaluate the administration’s response to the pandemic.

⁴¹ Dareh Gregorian, *Trump supporters crowd Tulsa ahead of Saturday rally*, NBC News (June 18, 2020), <https://www.nbcnews.com/politics/2020-election/trump-supporters-crowd-tulsa-ahead-saturday-rally-n1231454>.

⁴² Annie Karni, *Two More Trump Staff Members Test Positive for Coronavirus After Tulsa Rally*, N.Y. Times (June 22, 2020), <https://www.nytimes.com/2020/06/22/us/politics/trump-campaign-coronavirus-tulsa.html>.

⁴³ *Trump Urges Slowdown in COVID-19 Testing, Calling It a ‘Double-Edge Sword’*, N.Y. Times, (June 21, 2020), <https://www.nytimes.com/reuters/2020/06/21/us/21reuters-health-coronavirus-trump-testing.html?searchResultPosition=6>.

⁴⁴ *Id.*

⁴⁵ Centers for Disease Control and Prevention, *Coronavirus Disease 2019: Cases in the US* (June 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁴⁶ Centers for Disease Control and Prevention, *Coronavirus Disease 2019: Forecasts of Total Deaths* (June 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/forecasting-us.html>.

⁴⁷ See, e.g., Amy Goldstein, *Fauci worries U.S. covid-19 cases could climb to 100,000 daily*, Wash. Post (June 30, 2020), https://www.washingtonpost.com/health/fauci-worries-us-covid-19-cases-could-climb-to-100000-daily/2020/06/30/917617ba-bafc-11ea-80b9-40ece9a701dc_story.html.

PLAINTIFF'S FOIA REQUESTS

29. On April 27, 2020, Plaintiff submitted FOIA requests to DOD, DIA, Indo-Pac, State, Treasury, and CIA regarding COVID-19. These requests are incorporated by reference and attached as Exhibit A (DOD), Exhibit B (DIA), Exhibit C (Indo-Pac), Exhibit D (State), Exhibit E (Treasury), and Exhibit F (CIA).

30. On April 28, 2020, Plaintiff submitted a FOIA request to ODNI regarding COVID-19. The request is incorporated by reference and attached as Exhibit G (ODNI).

31. Plaintiff requested expedited processing of all of the requests on the grounds that it is an organization “primarily engaged in disseminating information” and because the records sought contain information “urgent[ly]” needed to “inform the public concerning actual or alleged government activity.” *See, e.g.*, Ex. A at 7-9 (citing 5 U.S.C. § 552(a)(6)(E)(v)(II)). Given the public health concerns at issue, Plaintiff further requested expedition on the grounds that failure to obtain the requested records on an expedited basis could “reasonably be expected to pose an imminent threat to the life or physical safety of an individual.” *See id.* (citing 5 U.S.C. § 552(a)(6)(E)(v)(I)).

32. Plaintiff requested fee waivers for all of the requests on the grounds that it is a “representative of the news media” within the meaning of FOIA, *see, e.g.*, Ex. A at 9-10 (citing 5 U.S.C. §§ 552(a)(4)(A)(ii)(II)), and that disclosure of the requested records is in the public interest because it is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* (citing 5 U.S.C. § 552(a)(4)(A)(iii)).

AGENCY RESPONSES

Department of Defense

33. On May 7, 2020, Defendant DOD responded to Plaintiff's request, acknowledging the request was received on April 28, 2020, assigning internal case number 20-F-1014, granting expedited processing, and deferring a decision regarding the fee waiver. A copy of DOD's correspondence containing this information is incorporated by reference and attached as Exhibit H.

34. In that letter, DOD cited the unusual circumstances exception under 5 U.S.C. § 552(a)(6)(B)(i-iii) to extend its response time beyond FOIA's 20-day statutory response period, pointing to the fact that the FOIA office handled FOIA requests, but did not "actually hold [] records [from several DOD components] and [DOD's FOIA] office is not geographically located with these organizations." Ex. H.

35. On May 27, 2020, DOD contacted Plaintiff to request a clarification regarding the time-frame for the request. A copy of that request for clarification is incorporated by reference and attached as Exhibit I.

36. Plaintiff provided that clarification on May 28, 2020, specifying that Plaintiff was seeking records created "on or after October 1, 2019 until the date a genuine search is commenced" unless otherwise specified. Ex. I.

37. To date, DOD has not made a determination on Plaintiff's request as required by FOIA and has not disclosed any responsive records.

38. Plaintiff has constructively exhausted administrative remedies on account of DOD's failure to comply with the 20-day time limit, even with the ten-day "unusual circumstances" extension, for making a determination on Plaintiff's request as required by FOIA.

Defense Intelligence Agency

39. To date, Defendant DIA has not responded to Plaintiff's request. A copy of the email attaching Plaintiff's request is incorporated by reference and attached as Exhibit J.

40. To date, DIA has not made a determination on Plaintiff's request as required by FOIA and has not disclosed any responsive records.

41. Plaintiff has constructively exhausted administrative remedies on account of DIA's failure to comply with the 20-day time limit for making a determination on Plaintiff's request as required by FOIA.

U.S. Indo-Pacific Command

42. On April 28, 2020, Defendant Indo-Pac acknowledged Plaintiff's request was received on April 27, 2020 and assigned it USINDOPACOM Request ID Number 2020-F-067. A copy of that acknowledgement is incorporated by reference and attached as Exhibit K.

43. Indo-Pac has not made a determination on Plaintiff's request as required by FOIA and has not disclosed any responsive records.

44. Plaintiff has constructively exhausted administrative remedies on account of Indo-Pac's failure to comply with the 20-day time limit for making a determination on Plaintiff's request as required by FOIA.

Department of State

45. On May 1, 2020, Defendant State responded to Plaintiff's request, acknowledging the request was received on April 28, 2020, denying expedited processing on the grounds that the request did not demonstrate a "compelling need" for information, and deferring a decision

regarding the fee waiver. A copy of State's correspondence containing this information is incorporated by reference and attached as Exhibit L.

46. In that correspondence, State cited the unusual circumstances exception under 5 U.S.C. § 552(a)(6)(B)(i)-(iii) to extend its response time beyond FOIA's 20-day statutory response period. State pointed to the "need to search for and collect requested records from other Department offices or Foreign Service posts." Exhibit L.

47. To date, State has not made a determination on Plaintiff's request as required by FOIA and has not disclosed any responsive records.

48. Plaintiff has constructively exhausted administrative remedies on account of State's failure to comply with the 20-day time limit, even with the ten-day "unusual circumstances" extension, for making a determination on Plaintiff's request as required by FOIA.

Department of Treasury

49. On May 1, 2020, Defendant Treasury responded to Plaintiff's request by denying expedited processing and deferring a decision regarding the fee waiver. A copy of Treasury's correspondence containing this information is incorporated by reference and attached as Exhibit M.

50. To date, Treasury has not made a determination on Plaintiff's request as required by FOIA and has not disclosed any responsive records.

51. Plaintiff has constructively exhausted administrative remedies on account of Treasury's failure to comply with the 20-day time limit for making a determination on Plaintiff's request as required by FOIA.

Office of the Director of National Intelligence

52. On April 30, 2020, Defendant ODNI responded to Plaintiff's request, acknowledging the request was received on April 30, 2020, assigned internal tracking number DF-2020-00213, and granted expedited processing and a fee waiver. A copy of ODNI's correspondence containing this information is incorporated by reference and attached as Exhibit N.

53. To date, ODNI has not made a determination on Plaintiff's request as required by FOIA and has not disclosed any responsive records.

54. Plaintiff has constructively exhausted administrative remedies on account of ODNI's failure to comply with the 20-day time limit for making a determination on Plaintiff's request as required by FOIA.

Central Intelligence Agency

55. On April 29, 2020, Defendant CIA responded to Plaintiff's request, acknowledging the request was received on April 28, 2020, assigned internal tracking number F-2020-01331, granted expedited review, and granted a fee waiver. A copy of CIA's correspondence containing this information is incorporated by reference and attached as Exhibit O.

56. On May 12, 2020, CIA conveyed to Plaintiff a final response in which it stated that the agency could "neither confirm nor deny the existence or nonexistence of records responsive to [Plaintiff's] request. The fact of the existence or nonexistence of such records is itself currently and properly classified and is intelligence sources and methods information protected from disclosure by Section 6 of the CIA Act of 1949, as amended, and Section 102(A)(i)(I) of the National Security Act of 1947, as amended." CIA therefore denied Plaintiff's request "pursuant

to FOIA exemptions (b)(1) and (b)(3).” A copy of CIA’s determination letter is incorporated by reference and attached as Exhibit P.

57. On June 1, 2020, Plaintiff appealed that determination, noting that “[t]he CIA’s summary response entirely fails to meet the agency’s burden under the FOIA of demonstrating that it is entitled to refuse to confirm or deny the existence of records responsive to the Request.” Plaintiff further explained that “the fact of the existence or nonexistence of responsive records is not properly classified” and the CIA had not “demonstrated that the existence or non-existence of a single record responsive to the request [was] ‘intelligence sources and methods information protected from disclosure.’” Plaintiff also noted that much “information about the CIA’s role in the coronavirus is already in the public domain, as are official government statements acknowledging the intelligence community’s role in government’s response to the virus.” This rendered the CIA’s blanket and summary refusal to “confirm or deny the existence of responsive records [] untenable.” A copy of Plaintiff’s appeal is incorporated by reference and attached as Exhibit Q.

58. As of July 2, 2020, CIA has not provided a response or decision on Plaintiff’s administrative appeal. Accordingly, Plaintiff has exhausted all administrative remedies.

CAUSES OF ACTION

Violation of the Freedom of Information Act, 5 U.S.C. § 552

1. Plaintiff repeats, re-alleges, and incorporates the foregoing paragraphs as if set forth in full.
2. The failure of Defendants DOD, DIA, Indo-Pac, State, Treasury and ODNI to comply with the statutory time limit for rendering a determination on Plaintiff's FOIA requests violates 5 U.S.C. § 552(a)(6)(A)(i) and Defendants' corresponding regulations.
3. The failure of Defendant CIA to comply with the statutory time limit for rendering a decision on Plaintiff's appeal violates 5 U.S.C. § 552(a)(6)(A)(ii) and CIA's corresponding regulations.
4. Defendants' failure to make reasonable efforts to search for records responsive to Plaintiff's requests violates FOIA, 5 U.S.C. § 552(a)(3)(C), and Defendants' corresponding regulations.
5. Defendants' failure to promptly disclose records responsive to Plaintiff's requests violates FOIA, 5 U.S.C. § 552(a)(3)(A), and Defendants' corresponding regulations.
6. The failure of Defendants DIA, Indo-Pac, State, and Treasury to grant Plaintiff's requests for expedited processing violates FOIA, 5 U.S.C. § 552(a)(6)(E), and Defendants' corresponding regulations.
7. The failure of Defendants DOD, DIA, Indo-Pac, State, and Treasury to grant Plaintiff's request for a waiver of search, review, and duplication fees violates FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and Defendants' corresponding regulations.
8. Plaintiff has exhausted all applicable administrative remedies.

9. Plaintiff is entitled to injunctive relief with respect to the prompt disclosure of the requested documents.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- A. Expedite its consideration of this action pursuant to 28 U.S.C. § 1657(a);
- B. Order Defendants immediately to conduct a thorough search for records responsive to Plaintiff's requests;
- C. Order Defendants immediately to process any responsive records for disclosure and produce such records to Plaintiff;
- D. Enjoin Defendants from charging Plaintiff search, review, and duplication fees relating to the requests;
- E. Award Plaintiff its costs and reasonable attorneys' fees incurred in this action; and
- F. Grant such other relief as the Court may deem just and proper.

Dated: July 2, 2020
New York, New York

Respectfully submitted,

/s/ Mark F. Mendelsohn

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